

**California Department of Social Services
Proposed Trailer Bill**

Issue 846: IHSS Federally Eligible Providers

SECTION 1. Section 12305.81 of the Welfare and Institutions Code is amended to read:

12305.81. (a) It is the intent of the Legislature in enacting this provision to ensure that providers of In-Home Supportive Services for recipients are in compliance with federal provider requirements pursuant to section 1001.101 of Title 42 of the Code of Federal Regulations and are eligible to receive payment for providing supportive services that qualify for federal financial participation.

(b) Notwithstanding any other law, a person shall not be eligible to provide or receive payment for providing supportive services for: (1) 10 years following a conviction for, or incarceration following a conviction for fraud against a government health care or supportive services program, including Medicare, Medicaid, or services provided under Title V, Title XX, or Title XXI of the federal Social Security Act, or a violation of subdivision (a) of Section 273a of the Penal Code, or a violation of Section 368 of the Penal Code, or similar violations in another jurisdiction, or

(2) a federal or state criminal offense for which the federal Office of the Inspector General is required to exclude an individual or entity pursuant to Section 1001.101 of Title 42 of the Code of Federal Regulations. The department shall notify the Department of Health Care Services of any person determined ineligible pursuant to Section 1001.101 of Title 42 of the Code of Federal Regulations consistent with the Patient Protection and Affordable Care Act, Public Law 111-148.

(c) Notwithstanding any other law, a person shall not be eligible to provide or receive payment for providing supportive services if the person has been excluded by the federal Office of Inspector General to provide Medicaid services pursuant to Section 1001.101 of Title 42 of the

Code of Federal Regulations or by the California Department of Health Care Services to provide Medi-Cal services.

(ed) The department and the State Department of Health Care Services shall develop a provider enrollment form that each person seeking to provide supportive services shall complete, sign under penalty of perjury, and submit to the county. Submission of the form shall include the photocopying by the county of original documentation verifying the provider's identity, and shall be considered as an application to render services under the Medi-Cal program consistent with subdivision (c) of Section 14043.1. A provider shall submit the form to the county in person, and the county shall retain the form and a copy of the identification documentation in the file of the provider. The form shall contain statements and as applicable require certification to the following effect:

(1) A person who, in the last 10 years, has been convicted for, or incarcerated following conviction for, fraud against a government health care or supportive services program is not eligible to be enrolled as a provider or to receive payment for providing supportive services.

(2) ~~An individual~~ A person who, in the last 10 years, has been convicted for, or incarcerated following conviction for, a violation of subdivision (a) of Section 273a of the Penal Code or Section 368 of the Penal Code, or similar violations in another jurisdiction, is not eligible to be enrolled as a provider or to receive payment for providing supportive services.

(3) A person who has been convicted for, or incarcerated following conviction for any federal or state criminal offense for which the federal Office of the Inspector General is required to exclude an individual or entity pursuant to Section 1001.101 of Title 42 of the Code of Federal Regulations is not eligible to be enrolled as a provider or to receive payment for providing supportive services.

(4) A person who has been excluded by the federal Office of the Inspector General or Department of Health Care Services from providing Medicaid or Medi-Cal services, respectively, as set forth in subdivision (c) is not eligible to be enrolled as a provider or to receive payment for providing supportive services.

(45) A statement declaring that he or she has not, in the last 10 years, been convicted for, or incarcerated following conviction for, a violation of subdivision (a) of Section 273a of the Penal Code, ~~or~~ Section 368 of the Penal Code, or similar violations in another jurisdiction.

(6) A statement declaring that he or she has not been convicted for, or incarcerated following conviction for any federal or state criminal offense for which the federal Office of the Inspector General is required to exclude an individual or entity pursuant to Section 1001.101 of Title 42 of the Code of Federal Regulations and that he or she shall inform the county of any future conviction of a federal or state criminal offense for which the federal Office of the Inspector General is required to exclude an individual or entity pursuant to Section 1001.101 of Title 42 of the Code of Federal Regulations.

(57) A statement declaring that ~~The~~ person agrees to reimburse the state for any overpayment paid to the person as determined in accordance with Section 12305.83, and that the amount of any overpayment, individually or in the aggregate, may be deducted from any future warrant to that person for services provided to any recipient of supportive services, as authorized in Section 12305.83.

(b) ~~e~~ The department shall include the text of subdivision (a) of Section 273a of the Penal Code, ~~and~~ Section 368 of the Penal Code and Section 1001.101 of Title 42 of the Code of Federal Regulations on the provider enrollment form.

(d) ~~f~~ A provider applicant or provider who has a conviction that may meet the federal exclusionary provisions of Section 1001.101 of Title 42 of the Code of Federal Regulations, as determined by the county, shall be provided and required to sign a provider verification form indicating whether the conviction identified by the county did or did not occur in connection with or related to the delivery of a health care item or service, or as specified in Section 1001.101 of Title 42 of the Code of Federal Regulations. The provider applicant or provider shall be required to return the provider verification form to the county to be enrolled or continue to be enrolled as an eligible provider.

(eg) A county, public authority or nonprofit consortium that is notified by the department or the State Department of Health Care Services that a supportive services provider is ineligible to receive payments under this chapter or under Medi-Cal law shall exclude that provider ~~from its registry~~.

(dh) A county, public authority or nonprofit consortium that determines that a ~~registry~~ provider is not eligible to provide supportive services based on the requirements of ~~subdivision (a)~~ subdivision (b) or (c) shall report that finding to the department.

(i) The Department of Health Care Services may request amendments to the State Plan, if determined necessary and appropriate, to ensure that the State shall continue to receive federal financial participation for supportive services providers.

(j) Notwithstanding any provision of law, this section shall control if determined to be in conflict with section 12305.87.

SEC. 2. Section 12305.87 of the Welfare and Institutions Code is amended to read:

12305.87. (a) (1) Commencing 90 days following the effective date of the act that adds this section, a person specified in paragraph (2) shall be subject to the criminal conviction exclusions provided for in this section, in addition to the exclusions required under Section 12305.81.

(2) This section shall apply to a person who satisfies either of the following conditions:

(A) He or she is a new applicant to provide services under this article.

(B) He or she is an applicant to provide services under this article whose application has been denied on the basis of a conviction and for whom an appeal of that denial is pending.

(b) Subject to subdivisions (c), (d), and (e), an applicant subject to this section shall not be eligible to provide or receive payment for providing supportive services for 10 years following a conviction for, or incarceration following a conviction for, any of the following:

(1) A violent or serious felony, as specified in subdivision (c) of Section 667.5 of the Penal Code and subdivision (c) of Section 1192.7 of the Penal Code.

(2) A felony offense for which a person is required to register under subdivision (c) of Section 290 of the Penal Code. For purposes of this subparagraph, the 10-year time period specified in this section shall commence with the date of conviction for, or incarceration following a conviction for, the underlying offense, and not the date of registration.

(3) A felony offense described in paragraph (2) of subdivision (c) or paragraph (2) of subdivision (g) of Section 10980.

(c) Notwithstanding subdivision (b), an application shall not be denied under this section if the applicant has obtained a certificate of rehabilitation under Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code or the information or accusation against him or her has been dismissed pursuant to Section 1203.4 of the Penal Code.

(d) (1) Notwithstanding subdivision (b), a recipient of services under this article who wishes to employ a provider applicant who has been convicted of an offense specified in subdivision (b) may submit to the county an individual waiver of the exclusion provided for in this section. This paragraph shall not be construed to allow a recipient to submit an individual waiver with respect to a conviction or convictions for offenses specified in Section 12305.81.

(2) The county shall notify a recipient who wishes to hire a person who is applying to be a provider and who has been convicted of an offense subject to exclusion under this section of that applicant's relevant criminal offense convictions that are covered by subdivision (b). The notice shall include both of the following:

(A) A summary explanation of the exclusions created by subdivision (b), as well as the applicable waiver process described in this subdivision and the process for an applicant to seek a general exception, as described in subdivision (e). This summary explanation shall be developed by the department for use by all counties.

(B) An individual waiver form, which shall also be developed by the department and used by all counties. The waiver form shall include both of the following:

(i) A space for the county to include a reference to any Penal Code sections and corresponding offense names or descriptions that describe the relevant conviction or convictions that are covered by subdivision (b) and that the provider applicant has in his or her background.

(ii) A statement that the service recipient, or his or her authorized representative, if applicable, is aware of the applicant's conviction or convictions and agrees to waive application of this section and employ the applicant as a provider of services under this article.

(3) To ensure that the initial summary explanation referenced in this subdivision is comprehensible for recipients and provider applicants, the department shall consult with representatives of county welfare departments and advocates for, or representatives of, recipients and providers in developing the summary explanation and offense descriptions.

(4) The individual waiver form shall be signed by the recipient, or by the recipient's authorized representative, if applicable, and returned to the county welfare department by mail or in person. The county shall retain the waiver form and a copy of the provider applicant's criminal offense record information search response until the date that the convictions that are the subject of the waiver request are no longer within the 10-year period specified in subdivision (b).

(5) An individual waiver submitted pursuant to this subdivision shall entitle a recipient to hire a provider applicant who otherwise meets all applicable enrollment requirements for the In-Home Supportive Services program. A provider hired pursuant to an individual waiver may be employed only by the recipient who requested that waiver, and the waiver shall only be valid with respect to convictions that are specified in that waiver. A new waiver shall be required if the provider is subsequently convicted of an offense to which this section otherwise would apply. A provider who wishes to be listed on a provider registry or to provide supportive services to a recipient who has not requested an individual waiver shall be required to apply for a general exception, as provided for in subdivision (e).

(6) Nothing in this section shall preclude a provider who is eligible to receive payment for services provided pursuant to an individual waiver under this subdivision from being eligible to receive payment for services provided to one or more additional recipients who obtain waivers pursuant to this same subdivision.

(7) The state and a county shall be immune from any liability resulting from granting an individual waiver under this subdivision.

(e) (1) Notwithstanding subdivision (b), an applicant who has been convicted of an offense identified in subdivision (b) may seek from the department a general exception to the exclusion provided for in this section.

(2) Upon receipt of a general exception request, the department shall request a copy of the applicant's criminal offender record information search response from the applicable county welfare department. Notwithstanding any other provision of law, the county shall provide a copy of the criminal offender record information search response, as provided to the county by the Department of Justice, to the department. The county shall provide this information in a manner that protects the confidentiality and privacy of the criminal offender record information search response. The state or federal criminal history record information search response shall not be modified or altered from its form or content as provided by the Department of Justice.

(3) The department shall consider the following factors when determining whether to grant a general exception under this subdivision:

(A) The nature and seriousness of the conduct or crime under consideration and its relationship to employment duties and responsibilities.

(B) The person's activities since conviction, including, but not limited to, employment or participation in therapy education, or community service, that would indicate changed behavior.

(C) The number of convictions and the time that has elapsed since the conviction or convictions.

(D) The extent to which the person has complied with any terms of parole, probation, restitution, or any other sanction lawfully imposed against the person.

(E) Any evidence of rehabilitation, including character references, submitted by the person, or by others on the person's behalf.

(F) Employment history and current or former employer recommendations. Additional consideration shall be given to employer recommendations provided by a person who has received or has indicated a desire to receive supportive or personal care services from the applicant, including, but not limited to, those services, specified in Section 12300.

(G) Circumstances surrounding the commission of the offense that would demonstrate the unlikelihood of repetition.

(H) The granting by the Governor of a full and unconditional pardon.

(f) A person determined to be ineligible to provide or to receive payment for the provision of services pursuant to Section 12305.81 shall not be eligible to provide or to receive payment for the provision of services pursuant to this section.

~~—(f)(g)~~ If the department makes a determination to deny an application to provide services pursuant to a request for a general exception, the department shall notify the applicant of this determination by either personal service or registered mail. The notice shall include the following information:

(1) A statement of the department's reasons for the denial that evaluates evidence of rehabilitation submitted by the applicant, if any, and that specifically addresses any evidence submitted relating to the factors in paragraph (3) of subdivision (e).

(2) A copy of the applicant's criminal offender record information search response, even if the applicant already has received a copy pursuant to Section 12301.6 or 12305.86. The department shall provide this information in a manner that protects the confidentiality and privacy of the criminal offender record information search response.

(A) The state or federal criminal history record shall not be modified or altered from its form or content as provided by the Department of Justice.

(B) The department shall retain a copy of each individual's criminal offender record information search response until the date that the convictions that are the subject of the exception are no longer within the 10-year period specified in subdivision (b), and shall record the date the copy of the response was provided to the individual and the department.

(C) The criminal offender record information search response shall not be made available by the department to any individual other than the provider applicant.

~~—(g)~~(h) (1) Upon written notification that the department has determined that a request for exception shall be denied, the applicant may request an administrative hearing by submitting a written request to the department within 15 business days of receipt of the written notification. Upon receipt of a written request, the department shall hold an administrative hearing consistent with the procedures specified in Section 100171 of the Health and Safety Code, except where those procedures are inconsistent with this section.

(2) A hearing under this subdivision shall be conducted by a hearing officer or administrative law judge designated by the director. A written decision shall be sent by certified mail to the applicant.

~~—(h)~~(i) The department shall revise the provider enrollment form developed pursuant to Section 12305.81 to include both of the following:

(1) The text of subdivision (c) of Section 290 of the Penal Code, subdivision (c) of Section 667.5 of the Penal Code, subdivision (c) of Section 1192.7 of the Penal Code, and paragraph (2) of subdivisions (c) and (g) of Section 10980.

(2) A statement that the provider understands that if he or she has been convicted, or incarcerated following conviction for, any of the crimes specified in the provisions identified in paragraph (b) in the last 10 years, and has not received a certificate of rehabilitation or had the

information or accusation dismissed, as provided in subdivision (c), he or she shall only be authorized to receive payment for providing in-home supportive services under an individual waiver or general exception as described in this section, and upon meeting all other applicable criteria for enrollment as a provider in the program.

~~—(i)~~(j) (1) Notwithstanding the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code), the department may implement and administer this section through all-county letters or similar instructions from the department until regulations are adopted. The department shall adopt emergency regulations implementing these provisions no later than July 1, 2011. The department may readopt any emergency regulation authorized by this section that is the same as or substantially equivalent to an emergency regulation previously adopted under this section.

(2) The initial adoption of emergency regulations pursuant to this section and one readoption of emergency regulations shall be deemed an emergency and necessary for the immediate preservation of the public peace, health, safety, or general welfare. Initial emergency regulations and the one readoption of emergency regulations authorized by this section shall be exempt from review by the Office of Administrative Law. The initial emergency regulations and the one readoption of emergency regulations authorized by this section shall be submitted to the Office of Administrative Law for filing with the Secretary of State and each shall remain in effect for no more than 80 days, by which time final regulations may be adopted.

~~—(j)~~(k) In developing the individual waiver form and all-county letters or information notices or similar instructions, the department shall consult with stakeholders, including, but not limited to, representatives of the county welfare departments, and representatives of consumers and providers. The consultation shall include at least one in-person meeting prior to the finalization of the individual waiver form and all-county letters or information notices or similar instructions.

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to make changes necessary for implementation of the Budget Act of 2011, it is necessary that this act take effect immediately.